

The New Republic: Buy Your Own Judge

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If you're worried about what 'Citizens United' will do to congressional races, just wait until you see what it does to the justice system.

Illinois is home to the nation's costliest judicial election ever: the 2004 contest between Lloyd Karmeier and Gordon Maag. The two candidates in Illinois's fifth judicial district together raised almost \$9.4 million, nearly double the previous national record. It topped the money raised in 18 of 34 U.S. Senate races decided that year. Even Karmeier, the winner of the race, described the money poured into the campaign as "obscene."

The eye-popping fundraising resulted from a parade of special interests on both sides of the "tort wars." The fifth district had been known for large damage awards against corporate interests, and the election's winner was expected to play a crucial role on a closely divided Illinois supreme court. Trial lawyers funneled millions to Maag, while Karmeier got buckets of cash from the U.S. Chamber of Commerce. Karmeier also got a boost from a company with a very real interest in the race's outcome: State Farm Insurance Company, which happened to be appealing a damage award of more than \$450 million. Karmeier got \$350,000 in contributions from employees, lawyers, and others directly involved with State Farm and another \$1 million from larger groups affiliated with the company. After he won the election, Karmeier cast the deciding vote that saved State Farm roughly a half-billion dollars.

The Illinois election wasn't an anomaly. In the last decade, state judicial elections across the country have evolved from quiet, civil contests into extravagant affairs with exorbitant spending, mud-slinging, and bitter personal attacks. Special interests in particular have helped engineer many of these races, pouring money into campaign coffers and negative TV ads. For instance, in a 2006 race in Washington — the most expensive judicial election that state had ever seen — every TV spot was paid for by a special interest group. As an Ohio AFL-CIO official put it, "We figured out a long time ago that it's easier to elect seven judges than to elect one hundred and thirty-two legislators."

And now, the problem is likely to get a lot worse. Much has been made about how *Citizens United v. Federal Election Commission* (FEC), the recent Supreme Court decision that lifted the ban on corporate spending in elections, will allow special interests to dump money into presidential and congressional races as never before. But the decision was handed down, in the words of Justice John Paul Stevens, just "when concerns about the conduct of judicial elections have reached a fever pitch." Indeed, thanks to *Citizens United*, the likely explosion of special-interest spending in this year's judicial races threatens to further erode the judiciary's independence.

This year, candidates in 18 states will face off to fill 34 supreme court seats. More than 30 other high court judges will sit for unopposed "retention" elections, in which voters will vote "yes or no" to keep them on the bench. And, because of *Citizens United*, many legal observers are expecting that these elections will be special-interest spending frenzies. Retired Supreme Court Justice Sandra Day

O'Connor said at a conference at Georgetown University Law Center in January that "Citizens United has signaled that the problem of campaign contributions in judicial elections might get considerably worse and quite soon."

Early comprehensive campaign finance numbers for this year's state judicial races aren't available yet, but there are a few key races to keep an eye on. In Illinois, Chief Justice Thomas R. Fitzgerald is vying to keep his seat after alienating the business community in early February by striking down a 2005 law that capped awards for certain medical malpractice claims. The same interests that pumped millions into Karmeier's 2004 campaign are sure to pull out their checkbooks to defeat the chief justice. Or consider Alabama, where state supreme court candidates raised over \$40 million in the last decade — the most in the country and nearly double that of the state with the next highest total. Four years ago, candidates running for chief justice there set a state record by raising \$8.2 million, largely from business and lawyer groups. This year, three seats currently held by Republicans are up for grabs, including one held by Justice Tom Parker. Groups like the Business Council of Alabama (which spent \$4.6 million on judicial races in the last decade) and the Lawsuit Reform PAC (\$1.3 million) are expected to invest heavily in Parker because they hope that, unlike his three Democratic challengers, he'll be a reliable conservative vote on economic issues. These groups will face off against the plaintiffs' bar and other more liberal groups that usually funnel their money through the state Democratic Party (which spent \$5.4 million on judicial races from 2000-2009).

The obvious question here is whether special-interest spending sways judges once they're presiding over cases. Three in every four Americans believe the answer is yes, according to a 2001 poll by Greenberg Quinlan Rosner Research. More importantly, even judges believe there is a connection: Of over 2,000 state judges polled in a 2002 Greenberg Quinlan survey, nearly half said campaign contributions influence judges' decision-making.

Ohio provides a good case study. Four years ago, Justice Paul Pfeifer, who is one of three state justices up for reelection in 2010, said that every dollar spent by business and consumer special interests in judicial elections was "buying a vote." A 2006 New York Times study suggests he may be right. The study found that, over a twelve-year period, Ohio justices (including Pfeifer) routinely sat on cases after having received campaign contributions from the parties involved. And, in those cases, the judges voted in favor of their contributors in seven cases out of ten. One justice voted for his contributors 91 percent of the time.

And then, there's Nevada, where a 2006 investigation by the Los Angeles Times revealed that even judges running unopposed collected hundreds of thousands of dollars in contributions from litigants, "frequently" dated "within days of when a judge took action in the contributor's case." In the case of one judge who raised \$70,000 from 140 attorneys and law firms, all of these donors who gave at least \$500 had a case pending before her. Public concerns about Nevada's court races prompted the legislature to put a referendum on the ballot this coming November that will ask the public to scrap contested judicial elections entirely and instead adopt a system of appointments.

Given recent history, it's not surprising that the public is concerned that justice is for sale to the highest bidder. A February 2009 USA Today/Gallup Poll found that 89 percent of those surveyed believe the influence of campaign contributions on judges' rulings is a problem. More than 90 percent said a judge should not hear a case if it involves an individual or group that contributed to the judge's election campaign. And Citizens United will likely only exacerbate these worries.

So what's to be done? First, states should adopt public financing systems for judicial elections (something West Virginia, North Carolina, New Mexico, and Wisconsin have already done). Public financing gets judges out of the unseemly business of dialing for dollars to make sure they win. States also need to adopt stricter disclosure rules, so the public knows which individuals and groups are spending in judicial campaigns. And states should institute new disqualification regulations to ensure that, if a judge is assigned to hear the case of a major campaign supporter, he or she must step aside and let a wholly impartial judge preside.

Enacting these rules would help protect the principle of impartiality that is so critical to our court system — and that Citizens United has seriously jeopardized. Unlike legislators and executive officials, who are expected to act in accordance with the interests of their constituents, judges don't "represent" anyone; they are answerable to the law, not to special interests that can cut the biggest campaign checks. The very legitimacy of the courts depends on the public believing that judges will treat every party without bias or favor. If, in the Citizens United era, states don't adopt public financing and strong disclosure and disqualification rules, the judiciary's credibility will dissolve ... and quickly.

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